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Supreme Court of the United States

OCTOBER TERM, 1938

No. 205

UNITED STATES OF AMERICA, EX REL. ANASTASIOS KIRKPOULOS AND ELIZABETH HINTOPOULOS, PETITIONERS,

vs.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE AT THE PORT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 24, 1938

CERTIORARI AND STAY GRANTED NOVEMBER 7, 1938

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 205

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(ORIGINAL)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, ex rel. ANASTASIOS HINTOPOULOS and ELIZABETH HINTOPOULOS, Relators-Appellants

against

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York, Respondent-Appellee

APPENDIX OF RELATORS-APPELLANTS

Jay Nicholas Long, Attorney for Relators-Appellants, 25 Broadway, New York 4, N. Y.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. ANASTASIOS HINTOPOLOUS and ELIZABETH HINTOPOULOS, Relators-Appellants

against

EDWARD J. SHAUGHESSY, District Director of Immigration and Naturalization at the Port of New York, Respondent-Appellee.

Appendix to Appellants' Brief

DOCKET ENTRIES

1955

July 14—Filed Petition for Writ of Habeas Corpus & Issued Writ—Ret. 7-19-55.

Aug. 1—Filed Return to writ.

Aug. 1—Filed traverse.

Aug. 1—Filed opinion #22,070. Writ dismissed—So ordered—Dawson, J.—Mailed notice of entry 8-1-55.

Aug. 4—Filed affidavit & show cause order to admit pet'r to bail pending appeal and staying deportation,—ret. 8-9-55.

1955

Aug. 9—Memo endorsed on motion filed 8-4-55—Referred to Dawson, J.—Lumbard, C. J.

[fol. 2] Aug. 11—Filed copy of show cause filed 8-4-55—Motion denied—Dawson, J.—Mailed notice of entry 8-13-55.

Aug. 11—Filed opposing affdvt.

Aug. 11—Filed relators' notice of appeal—Mailed copy to US Atty 8-13-55.

Aug. 12—Filed Recognizance—$1,000.00—Indemnity Ins. Co. of North America.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

OPINION AND ORDER NO. 22,070 OF JUDGE DAWSON FROM WHICH APPEAL IS TAKEN—AUGUST 1, 1955

Appearances:

Jay Nicholas Long, of New York, N. Y., Attorney for Relators.

Lloyd F. MacMahon, United States Attorney for the Southern District of New York, Attorney for Respondent; Lester Friedman, Attorney in the Office of the District Counsel, Immigration and Naturalization Service, Department of Justice, of Counsel.

[fol. 3] DAWSON, D. J.:

This matter, brought up by the issuance of a writ of habeas corpus, involves the question as to whether the denial to petitioners of suspension of deportation by the Attorney General was an abuse of discretion by the Attorney General.

The undisputed facts show that the relators are citizens of Greece who are now illegally in the United States. They last entered the United States in 1951 as members of a crew of a Greek steamship. They were granted shore leave for the period of time the vessel on which they arrived remained in port, but in no event to exceed twenty-nine days. They failed to depart from the United States before the expiration of their period of temporary admission and did not apply for any extension of this period.

In April, 1952, warrants of arrest were duly issued by the District Director of Immigration and Naturalization charging that the relators were unlawfully in the United States and subject to deportation. A hearing was accorded to the relators. The Hearing Officer made his decision, finding both relators deportable and denying their applications for suspension of deportation. An appeal was taken to the Board of Immigration Appeals, and that Board, on March 18, 1954, made an order denying their applications for suspension of deportation and dismissing their appeal. They were given permission to depart voluntarily from the United States.

Relators did not depart from the United States, but on April 19, 1954, filed a motion addressed to the Board of Immigration Appeals requesting that the proceedings be re-opened and their applications for suspension of deportation reconsidered. On May 5, 1954, the Board of Immigration Appeals denied relators' motion. They were given until August 20, 1954 within which to avail themselves of the privilege of voluntary departure. On May 11, [fol. 4] 1955, they submitted another motion addressed to the Board or Immigration Appeals asking that the administrative proceedings be re-opened and their application for suspension of deportation reconsidered. These motions were denied by the Board of Immigration Appeals on June 3, 1955.

On July 12, 1955, relators submitted an application that their deportation be stayed on the ground that the deportation could possibly endanger the life of the relator Elizabeth Hintopoulos and would involve "the possible loss of the unborn child with whom she is now in the fifth month of pregnancy". On July 13, 1955, this relator was examined by a surgeon of the United States Public Health Service who certified that she was able to travel without danger to life; that she required no immediate medical treatment, and that she could travel aboard a vessel having a physician aboard. Thereupon, relators' application for a stay of deportation was denied and they were taken into custody for deportation.

Relators do not deny that they are illegally in the Country and are subject to deportation. They urge, however,

that they were eligible for suspension of deportation under the provisions of § 19(c) of the Immigration Act of 1917, as amended, and that the refusal of the Attorney General to suspend deportaion under the provisions of this statute was an abuse of discretion.

The respondent admits that relators came within the category of the persons for whom the Attorney General might suspend deportation. Respondent urges, however, that the suspension of deportation under the provisions of this statute is purely a matter of the discretion of the Attorney General; that the Attorney General exercised his discretion and did not exercise it capriciously or arbitrarily.

It is well established that the Courts may not review the exercise of such discretion by the Attorney General, [fol. 5] and that they may interfere only where there has been a clear abuse of discretion or a clear failure to exercise discretion. In such cases, the Court can do no more than to require that the discretion be properly exercised. *United States ex rel. Kaloudis* v. *Shaughnessy* (C. A. 2, 1950), 180 F. 2d 489; *United States ex rel. Adel* v. *Shaughnessy* (C. A. 2, 1950), 183 F. 2d 371; *United States ex rel. James* v. *Shaughnessy* (C. A. 2, 1953), 202 F. 2d 519, cert. den. 345 U. S. 969.

The administrative record which was submitted in connection with this proceeding shows that the Board of Immigration Appeals recognized that relators had established the statutory requirements for discretionary suspension of deportation under § 19(c) of the Immigration Act of 1917, as amended, and that the Board recognized that the deportation of relators might result in "serious economic detriment" to their citizen minor child. After considering these matters, however, the Board denied the suspension of deportation as a matter of administrative discretion.

Prior to the final determination of this matter by the Board of Immigration Appeals, Congress had enacted the Immigration and Nationality Act, of 1952. Under the 1917 Act, as amended, the application for suspension of deportation had to show "serious economic detriment". Under the 1952 Act, the applicant would have to show that the deportation would "result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child", 8 U. S. C. § 1254(a)(1).

In the consideration of the 1952 Act in Congress, this change in the test to be applied to suspension of deportation was considered. The Senate Judiciary Committee, in its report on the Bill which subsequently became law, said:

> "The bill accordingly establishes a policy that the administrative remedy should be available only in the very limited category of cases in which the deporta-
> [fol. 6] tion of the alien would be unconscionable. Hardship, or even unusual hardship to the alien or to his spouse, parent, or child is not sufficient to justify suspension of deportation."*

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* The Senate Judiciary Committee stated in Senate report No. 1137, with reference to the Bill which subsequently became law, as follows:

> "The term 'exceptional and extremely unusual hardship' requires some explanation. The committee is aware that in almost all cases of deportation, hardship and frequently unusual hardship is experienced by the alien or the members of his family who may be separated from the alien. The committee is aware, too, of the progressively increasing number of cases in which aliens are deliberately flouting our immigration laws by the processes of gaining admission to the United States illegally or ostensibly as non-immigrants but with the intention of establishing themselves in a situation in which they may subsequently have access to some administrative remedy to adjust their status to that of permanent residents. The practice is grossly unfair to aliens who await their turns on the quota waiting lists and who are deprived of their quota numbers in favor of aliens who indulge in the practice. This practice is threatening our entire immigration system and the incentive for the practice must be removed. Accordingly, under the bill, to justify the suspension of deportation the hardship must not only be unusual but must also be exceptionally and extremely unusual. The bill accordingly establishes a policy that the administrative remedy should be available only in the very limited category of cases in which the deportation of the

The Attorney General, in exercising his discretion, could take into account the new standard which was laid [fol. 7] down by Congress. The new standard was referred to in the decision of the Board of Immigration and Appeals of May 5, 1954. The Board in that opinion recognized that the deportation might result in "serious economic detriment to the American born infant child", but concluded that this was not alone enough to warrant suspension of deportation. The Board pointed out that the child at the time of the decision in 1954 was about two and one-half years old; that the parents had been in the United States for a period of less than three years; that both had arrived in this Country as seamen; that they have no other dependents or close family ties here, and the made relator may be able to obtain work as a Greek seaman and earn about $85 per month.

Under the circumstances, it appears clear that the Board of Immigration Appeals, acting for and on behalf of the Attorney General, exercised its discretion; that it did not capriciously exercise its discretion or abuse its discretion. Under the circumstances, this Court has no power to review this exercise of discretion by the Attorney General.

The writ of habeas corpus is dismissed. So ordered.

Dated: New York, N. Y., August 1, 1955.

Archie Dawson, U. S. D. J.

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alien would be unconscionable. Hardship or even unusual hardship to the alien or to his spouse, parent, or child is not sufficient to justify suspension of deportation. To continue in the pattern existing under the present law is to make a mockery of our immigration system." (Quoted in "Commentary on the Immigration and Nationality Act" by Walter M. Besterman, Legislative Assistant, Committee on the Judiciaries, House of Representatives, Vol. 8 U.S.C. p. 67.)

[fol. 8] UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

DECISION AND ORDER OF HEARING OFFICER, DATED MAY 29, 1952

Files: A— New York (0300/408917) (male)
A— (0300/408918) (female)

In re: Anastasios Hintopoulos (male)

and

Elizabeth Hintopoulos ~~nee~~ Bozatsidis a/k/a Zogrofou

In Deportation Proceedings

In Behalf of Respondents:

No one.

Charges:

Warrant: Act of 1924—No Immigration Visa.
Lodged: None.

Application:

Suspension of deportation—Economic detriment.
Voluntary Departure in the alternative.

Detention Status:

(For both) Released on conditional parole.
Oral Decision of Hearing Officer.
Entered on May 29, 1952.

[fol. 9] DISCUSSION:

This record relates to a husband and wife, both Greek citizens now 38-years-old and 28-years-old respectively. The husband who is a native of Turkey last arrived in the United States at the port of Baltimore, Maryland, August 15, 1951 when he was admitted as a seaman on the SS "PANAGIOTIS KOUMANDAROS". That entry has been verified. He has stated that he then left his ship because of his wife's illness and that he intended to remain in this

country until such time as she recovered. Admittedly, however, he did not know what period of time that might take. He never applied for an extension of his stay and has never been in possession of an immigration visa to enter this country for permanent residence. Since at the time of his admission it was his intention to remain in the United States for an indefinite period, he was not a bona fide non-immigrant and is therefore now amenable to deportation under the Immigration Act of 1924 as an immigrant without a visa.

The female respondent who is a native of the Soviet Union, last arrived in the United States July 4, 1951 at the port of Newport News, Virginia when she was admitted as a seaman on the SS "PANAGIOTIS KOUMANDAROS", the same ship on which her husband was then serving as a member of crew and on which he last arrived a month later. Her entry also has been verified. Her testimony regarding her intention at the time of her admission was somewhat evasive and contradictory. She stated at one point that at the time of her admission she knew that she was then pregnant and wished to remain in the United States until such time as her child was born. At another point she changed and stated that at the time of her entry she intended to be examined by a doctor ashore to determine whether or not she could continue to travel in her pregnant state. She has [fol. 10] conceded that in any case it was her intention at the time of her arrival to abide by the decision of this doctor as to the length of time she should remain in the United States. She, too, never applied for an extension of her stay and has never had an immigration visa. Since at the time of her admission to the United States last it was her plans to remain in this country for an indefinite period she was not a bona fide non-immigrant then. Her entry was therefore not a lawful one and she is deportable under the Immigration Act of 1924 as an immigrant without a visa.

Both respondents have applied for suspension of deportation on the ground of the economic detriment that would befall their minor son in the event they were deported. They have asked in the alternative for voluntary departure in lieu of deportation. Both disclaim having a criminal record anywhere and both allege that they have been persons of good moral character. Evidence of record would tend to corroborate their testimony in this respect. Their

only income is from the employment of the male respondent on two jobs, the one as a salesman and the other as a superintendent of the apartment house in which they live. His combined income amounts to approximately $64 a week. Their joint assets consist of savings in the sum of about $500 and their furniture and other personal property which they value at $1500. While it would seem that their son, who was born in New York City in November, 1951 would suffer economically if his parents should be deported, it is not believed that as a matter of administrative discretion the respondents' applications for suspension of deportation should be granted. They have been in the United States for a period of less than one year. They have no relatives in this country other than each other and their son. To grant both this form of relief upon the accident of birth in the United States of their son would be to [fol. 11] deprive others, who are patiently awaiting visas under their already oversubscribed quotas. It is noted also that neither respondent reported his and her presence in the United States at any time until January, 1952 when they filed applications for suspension of deportation just two months after the birth of their child. However, since they meet the statutory requirements for the alternative application they have made and since they have indicated that they would be willing and are able to leave this country within the period of approximately thirty days, their applications for voluntary departure in lieu of deportation will be granted. In the event that final order should be for their deportation they have elected to be returned to Greece.

FINDINGS OF FACT:

Upon the basis of all the evidence presented, it is found:

(1) That the respondents are aliens, both citizens of Greece, the male a native of Turkey and the female a native of the Soviet Union.

(2) That the male respondent last entered the United States at the port of Baltimore, Maryland, August 15, 1951 as a seaman on the SS "PANAGIOTIS KOUMANDAROS".

(3) That the female respondent last entered the United States at the port of Newport News, Virginia,

July 4, 1951 as a seaman on the SS "PANAGIOTIS KOUMANDAROS".

(4) That both respondents at the time of their respective entries intended to remain in the United States for an indefinite period.

(5) That neither respondent was in possession of an immigration visa.

[fol. 12] CONCLUSION OF LAW:

Upon the basis of the foregoing findings of fact, it is concluded:

(1) That under Sections 13 and 14 of the Immigration Act of May 26, 1924 the respondents are subject to deportation in that at the time of entry they were immigrants not in possession of valid immigration visas and not exempted from the presentation thereof by said Act or regulations made thereunder.

ORDER:

It is ordered that applications for suspension of deportation be denied.

It is further ordered that orders of deportation be not entered at this time but that the aliens be required to depart from the United States without expense to the Government within such period of time and under such conditions as the Officer in charge of the district deems appropriate.

It is further ordered that if the aliens fail to depart when and as required this privilege of voluntary departure be withdrawn without further notice or proceedings and the aliens deported from the United States pursuant to law on the charge in the Warrants of Arrest.

* * * * * * *

Charles G. McCarthy, Hearing Officer.

R: 5/29/52
T: 7/23/52
CGMcC/mb.

[fol. 13] UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

DECISION AND OPINION OF BOARD OF IMMIGRATION APPEALS, DATED MARCH 18, 1954

Files: A-8227824 T.—New York (0300-408917)
A-8227810 T. (0300-408918)

In re:

ANASTASIOS HINTOPOULOS and ELIZABETH HINTOPOULOS nee BOZATSIDIS or ZOGROFOU.

In deportation Proceedings.

In Behalf of Respondents:

Sylvester Pindyck, Esquire
165 Broadway
New York 6, New York

(Heard: January 23, 1953).

Charges:

Warrant: Act of 1924—No immigration visas.
Lodged: None.

Application:

Suspension of deportation—Economic detriment (Act of 1917, as amended.) (Both.)

This appeal relates to two persons, husband and wife, ages 38 and 28 years respectively, and is from a decision of a hearing officer at New York on May 29, 1952. The respondents have been found deportable on the charge in [fol. 14] the respective warrants of arrest and have been granted voluntary departure as the maximum discretionary relief. The sole issue on appeal is whether the respondents should be granted suspension of deportation.

The male respondent is a native of Turkey, citizen of Greece, who last entered the United States on August 15, 1951 at Baltimore, Maryland as a crewman on the SS "Panagiotis Koumandaros". His entry has been verified.

His testimony shows that he entered this country to remain for an indefinite period and that he never sought an extension of the period of stay as a seaman. He is deportable under the Immigration Act of 1924 on the charge in the warrant of arrest which relates to him.

The female respondent is a native and subject of the Soviet Union. She last entered the United States on July 4, 1951 at Newport News, Virginia after arrival as a seaman on the SS "Panagiotis Koumandaros". Her entry has been verified. She alleges that she failed to depart because of illness and physical condition in that she was expecting the birth of her child. It is obvious that she intended to remain in this country for an indefinite period and never sought to obtain an extension of the period for which she was admitted as a crewman. She is clearly deportable under the Immigration Act of 1924 on the charge in the warrant of arrest which relates to her.

The respondents have requested suspension of deportation and have predicated their applications on a serious economic detriment that would result to their American citizen child, born in this country in November 1951. These respondents were married prior to coming to this country and at the time of last entry the female respondent was expecting the birth of her child. The male respondent is employed and earns about $64 weekly. The joint assets consist of about $500 in cash and personal property of the value of about $1500. It is obvious that the American citizen infant child is dependent upon the alien parents for economic support, care and maintenance. Documentary [fol. 15] and other evidence establish good moral character for the requisite period. The aliens have no connection with subversive groups.

In the argument of counsel in support of the appeals, there are cited three decisions, two by this Board in 1947 and 1949, respectively; and one by the Commissioner for the Service decided in 1951. Counsel alleges that the facts in the cases he has referred to are similar to the facts in the instant case and that maximum discretionary relief was granted in the cases cited by him.

The first decision relied upon by counsel is *Matter of T—*, Int. Dec. 142, 3 I. & N. Dec. 707 (B. I. A. November 25, 1949). That decision involved an application for suspen-

sion or deportation by an alien mother illegally residing in this country and her legally resident alien husband and a two-year-old American citizen child. In other words, the family consisted of one alien illegally residing in this country, an alien legally residing herein, and an American citizen infant child. We find that the situation is clearly distinguishable from the facts in the case before us in which we have two illegally resident alien parents and one American citizen infant child.

The second decision referred to by counsel is *Matter of C—*, 2 I. & N. Dec. 895 (B. I. A. October 9, 1947). That case involved the welfare of an alien father who had resided illegally in the United States for a period of seven years, and a native-born United States citizen spouse and two native-born American citizen minor children. We find that this situation is clearly distinguishable from the family situation in the instant case.

The last case referred to by counsel is a situation where there were two aliens, husband and wife, who had been in the United States for a period of four years illegally. They were the parents of an American citizen infant child who was dependent on them for support. Their applications for suspension of deportation were favorably considered [fol. 16] and the case was referred to the Congress on May 1, 1951.

As stated above, we have, in the instant case, a family consisting of two alien parents illegally residing in the United States and one American citizen child, age about two and one-half years. These respondents have been in the United States for a period of less than three years. Both arrived in this country as seamen. They have no other dependents or close family ties here. The record indicates that the male respondent may be able to obtain work as a Greek seaman and earn about $85 monthly.

Notwithstanding the fact that the family situation in the case before us is similar to the situation in the case last referred to by counsel, in which a decision was made in 1951; and notwithstanding the fact that the deportation of these respondents would result in a serious economic detriment to an American citizen infant child, the granting or withholding of maximum discretionary relief depends on the factors and merits in each individual case, and is a

matter of administrative discretion.[1] We have carefully examined the facts and circumstances in the instant case and we find that the granting of the maximum relief is not warranted by the record in the case. The appeals will be dismissed.

ORDER:

It is ordered that the applications of these aliens for suspension of deportation be denied.

It is further ordered that the appeals of the subject aliens be and the same are hereby dismissed.

Thos. G. Finucane, Chairman.

[fol. 17] UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

DECISION AND OPINION OF BOARD OF IMMIGRATION APPEALS, DATED MAY 5, 1954

Files: A-8227824 T
A-8227810 T
New York (0300-408917)
(0300-408918)

In the Matter of ANASTASIOS HINTOPOULOS and ELIZABETH HISTOPOULOS nee BOZATSIDIS or ZOGROFU

In Deportation Proceedings

In Behalf of Respondents: J. Nicholas Long, Esquire, 25 Broadway, New York 4, New York.

These cases are before us on counsel's motion to reopen the proceedings for reconsideration of the respondents' applications for suspension of deportation.

The male respondent last entered the United States on August 15, 1951 and the female respondent on July 4, 1951. Both arrived as seamen and have been found deport-

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[1] *Weddeke* v. *Watkins*, 166 F. 2d 369; and *Kalpudis* v. *Shaughnessy*, 180 F. 2d 489.

able on the charge that they were immigrants at the time of entry and were not in possession of immigration visas. [fol. 18] They have one child who was born in the United States during November 1951. On March 18, 1954, we dismissed the appeals of the respondents from the hearing officer's decision granting voluntary departure and denying suspension of deportation. After considering all the facts in the case at that time, we denied suspension of deportation as a matter of administrative discretion.

Counsel's motion sets forth no matters of which we were unaware at the time our previous decision was rendered. It is crystal clear that Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244(a) of the Immigration and Nationality Act as well as the Congressional comment at the time this provision was enacted. We indicated in our previous order that the deportation of the respondents would result in a serious economic detriment to their citizen minor child, and we do not question that the respondents have established the statutory requirements for suspension of deportation under Section 19(c) of the Immigration Act of 1917, as amended.

Counsel argues that the two court decisions cited in our previous order [1] involved grounds for deportation specified in Section 19(d) of the Immigration Act of 1917, as amended. These cases were not within the purview of Section 19(d) although one alien had been convicted of incest and the other had been a member of the International Workers Order. Weddeke was not deportable because of his conviction and Kaloudis was not charged with being deportable because of his membership in the International Workers Order. In both cases, the decision of the court was predicated on the fact that, regardless of whether the aliens had established or could establish statutory eligi- [fols. 19-21] bility, the question of whether suspension of deportation should be granted was entirely discretionary with the Attorney General and his decision was not reviewable by a court unless clearly arbitrary.

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[1] *U. S. ex rel Weddeke* v. *Watkins*, 166 F. 2d 369 (C. A. 2, cert. denied 333 U.S. 876); *Kaloudis* v. *Shaughnessy*, 180 F. 2d 489.

Upon our further review of the cases of the two respondents, we adhere to our previous decision that suspension of deportation should be denied as a matter of administrative discretion and counsel's motion will, therefore, be denied.

Order: It is ordered that counsel's motion be and the same is hereby denied.

Thos. G. Finucane, Chairman.

[fol. 22] [Endorsed:] United States Court of Appeals, Second Circuit. Filed Aug. 1955. A. Daniel Fusaro, Clerk.

[fol. 23] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1955.

No. 144

Docket No. 23809

UNITED STATES OF AMERICA, ex rel. ANASTASIOS HINTOPOULOS and ELIZABETH HINTOPOULOS, Relators-Appellants

v.

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York, Respondent-Appellee.

OPINION—May 9, 1956

Before: FRANK, HINCKS and WATERMAN, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Archie O. Dawson, Judge, dismissing a writ of habeas corpus. Affirmed.

Jay Nicholas Long, New York, N. Y., for Relators-Apellants.

Teresa S. Reardon, Asst. U. S. Atty., S. D. N. Y. (Paul W. Williams, U. S. Attorney, S. D. N. Y.; Roy Babitt, Attorney, Immigration and Naturalization Service, on the brief), for Respondent-Appellee.

[fol. 24] HINCKS, Circuit Judge:

This appeal from an order dismissing a writ of habeas corpus turns upon the validity of an order of the Board of Immigration Appeals denying the appellants' request for suspension of deportation.

The facts are substantially as follows. The appellants are husband and wife, both Greek citizens. Both were admitted to the United States as seamen, the wife at Newport News, Virginia, on July 4, 1951 and the husband at Baltimore, Maryland, on August 15, 1951. At the time the female entered the United States she was six months pregnant and journeyed to New York to seek medical advice where her husband joined her at the later date when his ship next arrived in the United States. Their child was born in the United States on November 11, 1951 and thus by reason of his nativity is an American citizen. On January 4, 1952, the appellants voluntarily disclosed their illegal presence and made application to the Immigration Service for suspension of deportation. On Apri 9, 1952, warrants issued for their arrest in deportation proceedings, and on May 29, 1952 they were accorded a hearing thereunder at Ellis Island. The Hearing Officer found them deportable for entry into the United States with intent to remain indefinitely without possession of immigration visas, and denied their application for suspension of deportation. The Board of Immigration Appeals affirmed the decision of the Hearing Officer in an opinion dated March 18, 1954. On May 5, 1954, the Board reiterated its conclusion in denying a motion to reopen the proceedings. Thereafter, the appellants were taken into custody for deportation and a writ of habeas corpus was issued on July 14, 1955. On August 1, 1955, the United States District Court for the Southern District of New York, per Dawson, *J.*, dismissed the writ and upheld the decision of the Board as a proper exercise of the Attor-[fol. 25] ney General's discretionary power to grant or deny the relief requested. The present appeal is prosecuted from the dismissal of the writ below.

On this appeal, as below, the appellants do not question their deportability. Their attack on the administrative order is confined to so much thereof as denied their request for suspension of deportation. As to this the applicable

statute is the Immigration and Nationality Act of June 23, 1940, c. 439, §20(c) (which amended 39 Stat. 889) which, so far as here pertinent, provides:

> "In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may suspend deportation of such alien * * * if he finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the * * * minor child of such deportable alien."

It is clear that under this statute the "good moral character" of the appellants for five years and resultant "serious economic detriment [to] their minor child" were essential qualifications for the eligibility of these appellants for suspension of their deportation. In the administrative proceedings it was found that both these qualifications existed and that the appellants were indeed eligible. Notwithstanding, the Attorney General, through the Board of Immigration Appeals as his administrative delegate, in the exercise of the discretion vested in him by the Act, refused to grant a suspension.

To determine the validity of that action we look first to the opinion of the Board of Immigration Appeals of March 18, 1954. In that opinion, its Board took note of the financial condition of the appellants and went on to say:

> [fol. 26] " * * * It is obvious that the American citizen infant child is dependent upon the alien parents for economic support, care and maintenance. Documentary and other evidence established good moral character for the requisite period. The aliens have no connection with subversive groups."

It concluded its opinion with these two paragraphs:

> "As stated above, we have, in the instant case, a family consisting of two alien parents illegally residing in the United States and one American citizen child, age about two and one-half years. These respondents have been in the United States for a period of less than

three years. Both arrived in this country as seamen. They have no other dependents or close family ties here. The record indicates that the male respondent may be able to obtain work as a Greek seaman and earn about $85 monthly.

"Notwithstanding the fact that the family situation in the case before us is similar to the situation in the case last referred to by counsel, in which a decision was made in 1951; and notwithstanding the fact that the deportation of these respondents would result *in a serious economic detriment to an American citizen infant child,* the granting or withholding of maximum discretionary relief depends on the factors and merits in each individual case, and is a matter of administrative discretion.[1] We have carefully examined the facts

* * * * * *

and circumstances in the instane case and we find that the granting of the maximum relief is not warranted by the record in the case. The appeals will be dismissed.

* * * * * *

[fol. 27] The emphasis which we have added to the second paragraph just quoted shows unmistakably that the Board recognized that the applicable hardship test of eligibility was "a serious economic detriment to an American citizen," which was the precise test of eligibility for suspension provided in the applicable statute from which we quote above. On that basis, it found that the appellants were in all respects eligible for suspension. But in the belief that the exercise of its discretion under the statute "depends on the factors and events in each individual case" the Board denied suspension as "not warranted by the record in this case."

We see nothing in the opinion, or indeed in the underlying record, to suggest that the determination was arbitrary or based on irrelevant or improper considerations.

"[1] *Weddeke* v. *Watkins,* 166 F. 2d 369; and *Kaloudis* v. *Shaughnessy,* 180 F. 2d 489."

We cannot say as a matter of law that if, as a result of the parents' deportation, the minor child shall be reared, say, in Athens instead of in Brooklyn, that the resulting economic detriment to the child—which was recognized—is a factor of sufficient gravity to withhold the deportation of aliens who had entered this country with intent to remain indefinitely, in violation of the immigration laws, less than a year before the decision of the Hearing Officer which first ordered their deportation. We conclude that under our former decisions which the Board cited in its March 18th opinion—*Weddeke* and *Kaloudis*—the Board's action would have been unassailable if the administrative proceedings had stopped there. That conclusion is further supported by *United States, ex rel. James* v. *Shaughnessy*, 2 Cir., 202 F. 2d 519; *United States, ex rel. Adel* v. *Shaughnessy*, 2 Cir., 183 F. 2d 371; *United States, ex rel. Sleddens* v. *Shaughnessy*, 2 Cir., 177 F. 2d 363.

But thereafter the appellants made a motion to reopen the proceedings for reconsideration of the prior applica- [fol. 28] tions for suspension. This motion the Board denied with a short opinion dated May 5, 1954. In that opinion, it said:

> "Counsel's motion sets forth no matters of which we were unaware at the time our previous decision was rendered. It is crystal clear that Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244(a) of the Immigration and Nationality Act as well as the Congressional comment at the time his provision was enacted. We indicated in our previous order that the deportation of the respondents would result in a serious economic detriment to their citizen minor child, and we do not question that the respondents have established the statutory requirements for suspension of deportation under Section 19(c) of the Immigration Act of 1917, as amended."
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> . . . . . .
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> "Upon our further review of the cases of the two respondents, we adhere to our previous decision that suspension of deportation should be denied as a matter

of administrative discretion and counsel's motion will, therefore, be denied."

By these two paragraphs the Board made it abundantly clear that it adhered to its previous holding that the appellants' eligibility for a suspension was controlled by the 1940 Act; that under that Act the appellants were indeed eligible; and that *in the exercise of its discretion* it denied the suspension applied for. Having thus stated that its decision was made in the exercise of its discretion, we see no room whatever for the argument that the Board had failed or refused to exercise its discretion. In this respect, the case here is distinguishable from *Mastrapasqua* v. *Shaughnessy*, 2 Cir., 180 F. 2d 999, in which the Board had [fol. 29] refused to exercise its discretion. And since the Board found the appellants eligible for a suspension under the eligibility standard of the 1940 Act, its decision was not in conflict with our decision in *United States ex rel. Zacharias* v. *Shaughnessy*, 221 F. 2d 578.

The only remaining question is whether in its May opinion the reference to Section 244(a) of the Immigration and Nationality Act of 1952 indicates that in the formulation of its discretion the Board was improperly influenced by Congressional policy as manifested by the later Act. As to this, it will be noted that neither the 1940 Act nor the 1952 Act provide any indication of the factors which shall control the formulation of the discretion granted under each, once the respective eligibility requirements are found to exist—as they were here—the Board has untrammeled discretion to grant or withhold a suspension. Only if the discretion is shown to have been formulated on arbitrary or illegal considerations may the courts interfere. *United States ex rel. Kaloudis* v. *Shaughnessy*, 2 Cir., 180 F. 2d 489. This broad discretionary power was apparently granted in order to give the deportation provisions of the law some flexibility in cases involving more than usual hardship, the nature and gravity of which would vary with each case as it should thereafter arise. The appellants do not contend that the grant of discretion is unconstitutional for lack of specified standards governing its formulation. Such a contention, even if sound, would not help them. For if the grant of power were invalid, the appellants and all

other hardship cases would stand confronted with rigid deportation provisions as were their predecessors before the law was liberalized.

Since the Board had this broad power (in the comparatively narrow field which comprises those found eligible for a suspension) we think that in the formulation of its discretion it might properly take into account among other [fol. 30] factors its concept of Congressional policy as manifested in Section 244(a) of the 1952 Act. In *United States ex rel. Kaloudis* v. *Shaughnessy, supra,* at page 491, we said:

> "* * * The power of the Attorney General to suspend deportation is a dispensing power, like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict. It is a matter of grace, over which courts have no review, unless—as we are assuming—it affirmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant."

Let us somewhat develop the analogy there suggested by posing the situation which may confront a judge when he comes to impose sentence on, say, a convicted narcotic peddler. He is besought to dispose of the case by suspension of sentence and imposition of probation as under the applicable law he has power to do. In the exercise of his discretion he refuses to suspend and imposes a sentence to be served. Surely the sentence imposed is not invalid because his discretion was to some extent expressly affected by prevalent contemporary opinion that the public interest required more rigorous treatment of narcotic violators, whether such opinion was disclosed in recent Acts of Congress stiffening the penalties for such violators or merely in the public press. Doubtless a just judge will not abdicate his powers to public clamor or even to legislative opinion which does not purport to control formulation of his discretionary powers. But a wise judge will not put forth judgments from an ivory tower shutting his eyes to contemporary *mores* and public opinion.

Our conclusion is not in conflict with Section 405 of the 1952 Act. That section provides that "Nothing contained

in this Act * * * shall be construed to affect any proceedings * * * brought * * * at the time this Act shall take [fol. 31] effect; *but* as to all such * * * proceedings * * * *the statutes* * * * *repealed* by this Act *are* * * * *hereby continued in force* and effect." (Emphasis supplied.) We think that "nothing contained in this Act" means *no operative provision* of this Act such as the provision establishing the standard of eligibility. Cf. *United States ex rel. Zacharias v. Shaughnessy, supra.* That construction is required by the succeeding, antithetical, clause, "*but* as to all such * * * proceedings * * * the statutes repealed" are continued in effect. In other words, under Section 405 of the 1952 Act the appellants were entitled to have the application disposed of under the 1940 Act. And that right was fully accorded them. They were found eligible for suspension under the 1940 Act and the suspension was denied under the discretionary power created by the 1940 Act. The reference to Section 244(a) of the 1950 Act showed only that the Board considered its exercise of discretion to be consonant with the policy of that Act,—not that the scope of its discretionary power was restricted by that Act.

Affirmed.

FRANK, *Circuit Judge* (Dissenting):

When this court, on a petition for rehearing publishes a supplemental opinion which adheres to the previous decision, but on new grounds, the new opinion with its new rationale is invariably and correctly taken, by us and others, as reporting the basis of our decision. I think we must deal similarly with the Board. Accordingly, I think we must look to its second opinion, responsive to the motion for reconsideration, to learn the basis on which the Board refused to exercise its discretion favorably to appellants.

The Board's second opinion is set forth in full in the Appendix hereto. There the Board plainly stated, as follows, that it relied on Section 244(a) of the 1952 Act: "It [fol. 32] is crystal clear that Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244(a) of the Immigration and Nationality Act as well as the Congressional comment at the time this provision was enacted."

Judge Dawson, in dismissing the habeas corpus writ recognized that the Board took "into account the new standard which was laid down by Congress," and held that the Board, in so doing, acted properly.

Here the Board erred. The new statute narrowed the discretion of the Attorney General and thus of his delegate, the Board. Thus the Board did not feel free to exercise the discretion it had under the properly applicable legislation, *i.e.*, the statute as it stood before the 1952 amendment. However, the new Act, as my colleagues concede, had no application to this case. Accordingly, it was precisely as if the Board, without relying on the amended Act, had declared that it would never grant discretionary relief unless deportation would "result in exceptional and extremely unusual hardship to the alien, his spouse, parent or child." Such a restriction by the Board of the breadth of its discretion was arbitrary and therefore illegal.

This case is like *Mastrapasqua* v. *Shaughnessy*, 180 F. 2d 999, 1002-1004 (C. A. 2). There, an Italian seaman, detained in this country during the war, sought the discretionary relief of pre-examination or, in the alternative, suspension of deportation. The Board of Immigration Appeals refused to exercise its discretion because Mastrapasqua was in a class of aliens (those in the United States solely for reasons connected with the war) which the Attorney General, in a prior case, had said should be denied discretionary relief. We held that the Board was not justified in so refusing to exercise its discretion in this class of cases, since the classification was irrational and capricious, and we ordered Mastrapasqua's release from custody unless the [fol. 33] Board, within a reasonable time, exercised its discretion one way or the other, without reliance on any such limitation on its discretion.

My colleagues lean heavily on *U. S. ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 491 (C. A. 2) which suggested that the Attorney General's discretionary power to suspend deportation might be analogized to the President's power to pardon a convict. It should be noted that the *Mastrapasqua* case was decided by us less than two weeks after we decided *Kaloudis*. As the two must therefore be read together, it cannot be argued that the earlier decision (*Kaloudis*) over-ruled the later (*Mastrapasqua*) or vice

versa. Moreover, in *Kaloudis,* although we said that there the denial of discretionary relief rested on a ground that was not improper, we indicated that cases might arise where the discretionary power is exercised in disregard of implied limitations. See 180 F. 2d at 490.

Kaloudis did not say that the Board, in exercising its discretion, could apply a standard which Congress specifically said was not to be applied to cases, such as this, which come within the savings clause of Section 405 of the Immigration and Nationality Act of 1952, 66 Stat. 280.[1] In interpreting Section 405 in connection with the application of the pre-1952 test for determining eligibility of an alien for citizenship, the Supreme Court said, in *United States* v. *Menasche,* 348 U. S. 528, 535, "The whole development [fol. 34] of this general savings clause, its predecessors accompanying each of the recent codifications in the field of immigration and naturalization, manifests a well-established congressional policy not to strip aliens of advantages gained under prior laws. The consistent broadening of the savings provision, particularly in its general terminology, indicates that this policy of preservation was intended to apply to matters both within and without the specific contemplation of Congress."

In *United States ex rel. Zacharias* v. *Shaughnessy,* 221 F. 2d 578 (C. A. 2), this court, adopting the liberal view of the savings clause set forth in *Menasche,* held that the eligibility of an alien who came within the clause, for the discretionary relief of voluntary departure, was to be determined under the pre-1952 statute. I think that the same considerations which caused us to so hold in *Zacharias* re-

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[1] Section 405, in part, reads "*Nothing* contained in this Act, unless specifically provided therein, shall be construed to affect any prosecution, suit, action or proceedings, civil or criminal, brought * * * at the time this Act shall take effect; but as to all such * * * proceedings * * *, the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect * * * An application for suspension of deportation under Section 19 of the Immigration Act of 1917, as amended, * * * shall be regarded as a proceeding within the meaning of this subsection." (Emphasis added.)

quire that we now order the Board to exercise its discretion in determining whether to suspend the deportation of petitioners without regard to the new and more severe standard adopted by Congress in the 1952 Act.

[fol. 35] APPENDIX

These cases are before us on counsel's motion to reopen the proceedings for reconsideration of the respondents' application for suspension of deportation.

The male respondent last entered the United States on August 15, 1951 and the female respondent on July 4, 1951. Both arrived as seamen and have been found deportable on the charge that they were immigrants at the time of entry and were not in possession of immigration visas. They have one child who was born in the United States during November 1951. On March 18, 1954, we dismissed the appeals of the respondents from the hearing officer's decision granting voluntary departure and denying suspension of deportation. After considering all the facts in the case at that time, we denied suspension of deportation as a matter of administrative discretion.

Counsel's motion sets forth no matters of which we were unaware at the time our previous decision was rendered. (It is crystal clear that Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244(a) of the Immigration and Nationality Act as well as the Congressional comment at the time this provision was enacted.) We indicated in our previous order that the deportation of the respondents would result in a serious economic detriment to their citizen minor child, and we do not question that the respondents have established the statutory requirements for suspension of deportation under Section 19(c) of the Immigration Act of 1917, as amended.

Counsel argues that the two court decisions cited in our previous order involved grounds for deportation specified in Section 19(d) of the Immigration Act of 1917, as amended. These cases were not within the purview of Section 19(d) although one alien had been convicted of incest [fol. 36] and the other had been a member of the International Workers Order. Weddeke was not deportable be-

cause of his conviction and Kaloudis was not charged with being deportable because of his membership in the International Workers Order. In both cases, the decision of the court was predicated on the fact that, regardless of whether the aliens had established or could establish statutory eligibility, the question of whether suspension of deportation should be granted was entirely discretionary with the Attorney General and his decision was not reviewable by a court unless clearly arbitrary.

Upon our further review of the cases of the two respondents, we adhere to our previous decision that suspension of deportation should be denied as a matter of administrative discretion and counsel's motion will, therefore, be denied.

Order: It is ordered that counsel's motion be and the same is hereby denied.

[fols. 37-47] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

U. S. ex rel. ANASTASIO HINTOPOLOUS and ano., Relator-Appellants,

v.

EDWARD J. SHAUGHNESSY, District Director, etc., Respondent-Appellee

JUDGMENT—May 9, 1956

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

(S.) A. Daniel Fusaro, Clerk.

[fol. 48] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 49] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2534-6)